SUPREME COURT, U.S.
FILED
AUG - 4 2004
OFFICE OF THE CLERK

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No. 03-1564

IN THE

Supreme Court of the United States

GRANITE STATE OUTDOOR ADVERTISING, INC.,
PETITIONER

v.

CITY OF CLEARWATER, FLORIDA,
BRIAN AUNGST, SR., AS AN INDIVIDUAL AND IN HIS CAPACITY AS MAYOR OF THE CITY, WILLIAM HORNE, AS AN INDIVIDUAL AND IN HIS CAPACITY AS CITY MANAGER

ONPETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Petitioner Granite State Outdoor Advertising, Inc. ("Granite State") files this its reply to Respondent City of Clearwater, Florida's ("City") Brief in Opposition, to refute the incorrect and inflammatory assertions proffered by the City. Granite State further establishes that the Court should grant certiorari to correct the Eleventh Circuit Court of Appeals' decision which conflicts with this Court's prior precedent, decisions of other federal circuit courts, and departs from "the accepted and usual course of judicial proceedings" to the extent that it is necessary for the Court to exercise its supervisory powers. *E.g.*, Rule 10.

REPLY TO BRIEF IN OPPOSITION

I. The City Has Previously Enforced Unconstitutional Sign Regulations.

The City avers throughout its opposition that Granite State was motivated solely by greed in attacking the City's sign regulations. However, the City entirely disregards the fact that Granite State's challenge to the City's sign regulations resulted in the district court's invalidation of patently unconstitutional provisions that affected third parties who had been unable or unwilling to raise constitutional challenges to the invalid provisions for themselves. (51a-52a, 56a-59a) (invalidating as unconstitutional Sign Regulations, §§ 3-1803.B, 3-1803.L, 3-1803.T, 3-1803.U, 3-1805.N, 3-1805.C.2). Notably, this is not the first time in recent history that the City has been caught enforcing unconstitutional restrictions on signs. *E.g.*, *Dimmitt v. City of Clearwater*, 985 F.2d 1565 (11th Cir. 1993).

In *Dimmitt*, the Eleventh Circuit Court of Appeals upheld the district court's determination that Clearwater's restrictions on signs violated the First Amendment as an "overbroad restriction of protected speech." *Id.* at 1568. The circuit court allowed a commercial entity overbreadth standing to facially

challenge the City's entire regulatory scheme affecting signs even though the plaintiff's only harm resulted from the restrictions' content-neutral limitation on the number of flags permitted for display. *Id.* at 1568-69. The *Dimmitt* court refused to sever the offensive provision of the City's restrictions and invalidated the *entire* sign ordinance. *Id.* at 1573. *Dimmitt* emphasized that individual provisions of speech regulations cannot be evaluated as if they exist in a vacuum. *Id.* at 1569 (recognizing that the sign "ordinance applies to virtually any form of graphic communication that is publicly displayed, and thus plainly reaches conduct that is both expressive and noncommercial"). The circuit court concluded that a facial challenge requires that the entire "statutory framework" must be evaluated. *Id.* at 1572;[1] *also City of Littleton v. Z.J. Gifts D-4, L.L.C.*, ___ U.S. ___, 124 S.Ct. 2219, 2222 (2004) (allowing facial standing under the overbreadth doctrine in considering municipality's entire regulatory scheme restricting adult businesses even though plaintiff/respondent's business violated only single content-neutral provision); *United States v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003) (evaluating constitutionality of entire regulatory scheme in facial challenge to Children's Internet Protection Act); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (invalidating municipal zoning ordinance that on its face prohibited "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments"). The City continues to enforce unconstitutional sign regulations to the detriment of its residents and visitors.

In *Granite State v. Clearwater*, the Eleventh Circuit's panel glossed over the fact that Granite State was required to – and did – submit to a licensing scheme

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[1] Circuit Judge Birch was the author of both the unanimous *Dimmitt* decision and the inconsistent *Clearwater* opinion that no other circuit court judge joined. (13a).

that did not provide the "core" procedural safeguards required by this Court in municipal regulations that restrict First Amendment expression. (10a); *Littleton*, 124 S.Ct. at 2224 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)). Rather than substantively address Granite State's challenge to the impermissible prior restraint imposed by the regulations, the panel narrowed the scope of the constitutional inquiry to only a single provision of the City's sign regulations. (6a-7a). The circuit court's action has led to the absurd result of reviewing a sliver of the City's sign regulations without any context to adequately evaluate their validity.[2]

II. The Circuit Court's Decision Reinstated Patently Unconstitutional Restrictions On Signs To The Detriment Of The City's Citizens And Visitors.

The net effect of the Eleventh Circuit's *Granite State v. Clearwater* decision was to tacitly approve of the City's enforcement of unconstitutional restrictions on signs. As the Court has repeatedly emphasized, application of the overbreadth doctrine arises where a court makes a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Secretary of State of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 956-57 (1981) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612

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[2] The court of appeals also entirely ignored this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and therefore, did not acknowledge that "*[t]here can be no question that a prohibition on the erection of billboards infringes freedom of speech*: The exceptions [to the sign ordinance] do not create the infringement, rather the general prohibition does." *Id.* at 519 (emphasis added). Thus, under this Court's precedent, the City's general prohibition on the signs requested by Granite State also constituted actual injury.

(1973)). The district court made this judicial prediction and invalidated numerous provisions of Clearwater's sign regulations that had no impact on Granite State's ability to erect its signs. (51a-52a, 56a-59a); Part I, *supra*.

By limiting Granite State's facial overbreadth challenge to a single provision, the Eleventh Circuit panel ignored the district court's "judicial prediction" that specific provisions of the City's sign regulations impermissibly prohibited protected expression and took the unprecedented step of *reinstating several patently unconstitutional provisions* to the detriment of the citizens of the City. For example, the district court invalidated the City's temporal limitations imposed on signs with messages pertaining to a "political candidate or issue" and other temporary signs contained in Section 3-1805.N of the sign regulations. (54a-56a, 90a). The district court also invalidated Section 3-1803.B, which allowed pennants and other displays with content approved by City officials subject to the unbridled discretion of the same City officials. (52a, 75a). The district court also held that Section 3-1803.B "undermines the content-neutrality of the ordinance." (52a). Even though the City conceded on appeal that such provisions were unconstitutional, the circuit court's reversal of the district court's grant of overbreadth standing to Granite State reinstated these, and other, unconstitutional provisions of the City's sign regulations. Such provisions are unlikely to be challenged again because individuals and nonprofits typically do not have the resources to litigate.

Had the circuit court simply affirmed the district court's decision, the invalid provisions would have been relegated to the constitutional scrap heap. Contrary to the City's averments, affirmation of the district court's holding would *not* have resulted in Granite State being able to erect its requested signs. The district court's

order foreclosed such a result. (64a-65a). Rather than simply affirming the district court's decision, the circuit court took the outlandish action of reinstating unconstitutional speech restrictions to the detriment of the City's residents and visitors. To Petitioner's knowledge, no other court has taken the drastic step to reinstate regulations that plainly violate First Amendment rights. The Court should grant certiorari to correct this obviously abhorrent result.

III. The First Amendment Was Adopted To Prevent Government Tyranny.

Respondent alleges that the Court's grant of Granite State's Petition would result in an onslaught of unwelcome signs being imposed upon unwitting municipalities. The City's "Chicken Little" defense is disingenuous, represents an attempt to reargue the merits of the case, and disregards the facts. As noted above, had the Eleventh Circuit simply affirmed the district court's decision, Granite State would not have been able to erect the requested signs. *See* Part II, *supra*. Rather, Granite State's attack on the City's sign regulations resulted in the invalidation of unconstitutional restrictions on free speech that would have benefited the City's residents, businesses, organizations, and visitors had the circuit court not deprived Granite State of overbreadth standing to challenge the regulations. The City would have been forced to conform its sign regulations to constitutional mandates.

Granite State's challenge was neither part of a recent trend nor solely motivated by greed as the City suggests.[3] Contrary to the City's allegations, outdoor

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[3] Although Granite State had no signs in operation at the time it applied for signs in Clearwater, it now owns and operates 12 advertising faces in the State of Florida that display both noncommercial and commercial messages. Moreover, the fact that a startup company is not currently operating signs at the time of

advertising businesses such as Granite State have been challenging unconstitutional sign regulations for decades. *E.g.*, *Metromedia*, 453 U.S. at 509-11, nn. 14-15, 17 (citing cases in which restrictions on signs have been challenged dating back to the 1950's). More importantly, the Court has recognized the value of granting plaintiffs with a commercial interest in speech facial overbreadth standing to challenge entire regulatory schemes that restrict First Amendment rights. *E.g.*, *id.* at 504, n. 11 (holding billboard company had standing to challenge city's sign ordinance); *Littleton*, *supra* (granting adult business facial standing to challenge entire regulatory scheme). Were it otherwise, many an unconstitutional law would still be enforced today because most parties affected by such regulations would lack the resources necessary to challenge government entities. If left undisturbed, the *Granite State v. Clearwater* decision would reverse the equation.

While attempting to portray Granite State and other champions of First Amendment rights as villainous profiteers, the City asks this Court to ignore the fact that *it has voluntarily adopted and enforced sign regulations of dubious constitutional validity for years*. Moreover, the City has a history of enforcing unconstitutional restrictions on signs. *See* Part I, *supra*. Instead of accepting responsibility for the constitutional deficiencies, the City asserts that municipalities are victims; that Granite State and other parties are attempting to "pervert" the First Amendment. The City avers that its status as a government entity somehow

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application and constitutional injury should have no bearing on its standing to challenge the regulatory scheme under which its applications were denied. *See Ackerley Communications of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 38 (1st Cir. 1996) (determining that it is "impermissible to assign future speech rights based on . . . past speech").

absolves it from responsibility for its own unconstitutional conduct.

As the Court knows and has emphasized, the Bill of Rights was adopted to prevent government tyranny – not, as the City suggests, to shield governments from the consequences of enacting and enforcing constitutionally repugnant laws. *E.g.*, *McIntyre v. Ohio Elections Comm'n*, 513 U.S. 334, 364 (1995) (Thomas, J., concurring) (noting Anti-Federalist's insistence on inclusion of Bill of Rights); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (reiterating that First Amendment rights are fundamental personal rights and liberties protected by invasion from state and municipal actions). This Court has emphasized:

> Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution . . . .

Schneider v. New Jersey, 308 U.S. 147, 160 (1939). Moreover,

> [m]ere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Metromedia, 453 U.S. at 519-20 (quoting *Schneider*, 308 U.S. at 161); *also Schad*, 452 U.S. at 69-70. Courts must often evaluate competing interests to determine whether the infringement on protected speech is warranted. Plaintiffs, such as Granite State, have been time and again granted overbreadth standing to challenge regulations that restrict First Amendment activities. The *Granite State v. Clearwater* decision reverses the Court's holdings and enervates the ability of parties to challenge invalid restrictions on protected

speech. The Court should grant certiorari to prevent such results.

IV. The Eleventh Circuit's *Granite State v. Clearwater* Decision Conflicts With The Court's Recent *Littleton* Decision.

This Court recently reaffirmed that a plaintiff's facial challenge under the overbreadth doctrine is not limited to the discrete provision(s) of a regulatory scheme under which it suffered injury. *E.g.*, *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, *supra*. In *Littleton*, the plaintiff/respondent opened and operated its adult business in an unauthorized location in the city without any attempt at obtaining a license required by the municipal ordinance. *Littleton*, 124 S.Ct. at 2222. Instead of applying for a license or otherwise adhering to the requirements of the regulations, Z.J. Gifts facially challenged the entirety of the ordinance, and was granted standing to do so. *Id.*; *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1226-28 (10th Cir. 2002) (granting plaintiff overbreadth standing for a facial challenge to municipal zoning regulations affecting adult businesses), *rev'd on other grounds*, *Littleton*, 124 S.Ct. at 2226.

This Court *did not limit the plaintiff's standing to the specific provision* that rendered the plaintiff's use unlawful under the city's regulations. *Littleton*, 124 S.Ct. at 2222. The Court expressly noted that Z.J. Gifts' business violated Section 3-14-3(B) of the regulations, a content-neutral provision that prohibited establishing an adult business "within 500 feet of a church and day care center." *Id.* Had this Court utilized the *Granite State v. Clearwater* panel's interpretation of the overbreadth doctrine, Z.J. Gifts' standing would have been limited to challenging only Section 3-14-3(B) of Littleton's ordinance.

Instead, the Court allowed Z.J. Gifts to facially challenge the entire regulatory scheme, including the

provision providing applicants with access to judicial review, *even though Z.J. Gifts had never attempted to avail itself of this specific provision.*[4] *E.g.*, *id.* at 2222, 2225-26 (listing Sections 3-14-2, 3-14-3, 3-14-4, 3-14-5, 3-14-7, 3-14-8, 3-14-8(A), and 3-14-8(B)(3) in addition to 3-14-3(B)). As *Littleton* makes clear, plaintiffs who suffer harm under a discrete provision of an ordinance or regulatory scheme have standing to facially challenge *all invalid provisions* that are alleged to be overbroad in their application. Thus, under the Court's interpretation of overbreadth, Granite State should have been granted standing to challenge all of the sign regulations' invalid provisions, including the appeal process. Otherwise, if the Court did not acknowledge such standing, it would, of course, have had to dismiss Z.J. Gifts' claims *sua sponte.*

That the Court's *Littleton* decision applies to the present case cannot be seriously disputed. The majority's holding grants facial standing to challenge entire regulatory schemes to purveyors of sexually explicit materials while Granite State seeks to engage in a "'well-established medium of communication, used to convey a broad range of different kinds of messages'" protected by the First Amendment. *Metromedia*, 453 U.S. at 524 (Brennan, J., concurring, joined by Blackmun, J., quoting the plurality opinion at 453 U.S. at 501). Because the *Littleton* decision grants facial standing to challenge entire regulatory schemes to plaintiffs who engage in speech that is located at the fringe of constitutional protection, it necessarily follows that overbreadth standing extends to plaintiffs such as Granite State to challenge entire regulatory schemes

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[4] Notably, it was the plaintiff/respondent's challenge to this very provision that ultimately resulted in the Court's grant of certiorari to determine whether prompt judicial review meant a prompt judicial determination or prompt judicial access. *Littleton*, 124 S.Ct. at 2222.

that restrict protected speech and the traditional medium of signs.

CONCLUSION

Granite State's petition for writ of certiorari should be granted. The Eleventh Circuit's *Clearwater* decision makes a mockery of overbreadth standing and conflicts with both recent and well-established holdings of this Court and those of other circuits across the country. More importantly, the decision serves to shield governments from accountability for their enforcement of invalid speech restrictions. Indeed, the *Clearwater* decision resulted in the reinstitution of several unquestionably invalid restrictions on signs. Thus, the denial of overbreadth standing has visited irreparable harm on the citizens and organizations of Clearwater. This result perfectly illustrates both the rationale behind the overbreadth doctrine and the need for the Court to grant certiorari in this case.

DATED August 10, 2004.

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